Second. Action of Government officials in violation of the Constitution is void.[10] This is the ultimate essence of the present controversy. *Third.* A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials,[11] and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power. *Fourth.* The writ of habeas corpus is the established, time-honored process in our law for testing the authority of one who deprives another of his liberty,[12]—"the best and only sufficient defense of personal freedom."[13] The writ is the indispensable implementation of constitutional guarantees in respect to personal liberty.

At common law the writ issued to test the validity of confinement under English authority beyond the seas, although the decided cases dealt with British subjects.[14]

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them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States."

[10] Johnson v. Zerbst, 304 U. S. 458, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); STORY, CONSTITUTION OF THE UNITED STATES § 1842 (5th ed. 1891).

[11] THE FEDERALIST, No. 78; STORY, *op. cit. supra* note 10, §§ 1573 *et seq.*, 1621, 1645.

[12] Many histories of the writ have been written, and in them may be found the development of its distinctive characteristics. CHURCH, HABEAS CORPUS (2d ed. 1893); HURD, HABEAS CORPUS (2d ed. 1876); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 108 *et seq.* (1938); 9 HALSBURY, LAWS OF ENGLAND 701 *et seq.* (2d ed. 1933); Note, 61 HARV. L. REV. 657 (1948); Cohen, *Some Considerations on the Origins of Habeas Corpus*, 16 CANADIAN B. REV. 92 (1938). Halsbury's Laws of England, *op. cit. supra*, states the English law to be: "The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty [p. 702]. . . . The judges owe a duty to safeguard the liberty of the subject not only to the subjects of the Crown, but also to all persons within the realm who are under the protection of the Crown and entitled to resort to the Courts to secure any rights which they may have, and this whether they are alien friends or alien enemies. [p. 703.] . . . The writ . . . is a prerogative writ. . . . It is also a writ of right. . . . [p. 704.] The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute. [p. 706.]"

[13] *In re* Rosier, 76 U. S. App. D. C. 214, 221, 133 F. 2d 316, 323 (1942).

[14] Carus Wilson's Case, 7 Q. B. 984, 115 Eng. Rep. 759 (1845); *Ex parte* Anderson, 3 El. & El. 487, 121 Eng. Rep. 525 (1861); Rex v. Crewe, 102 Law Times Rep. 760 (Ct. of App. 1910), is cited upon the English view of jurisdiction to issue the writ. Petitioner was in

It is established in our law [15] that enemy aliens may resort to

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the Bechuanaland Protectorate, South Africa, confined under authority of a proclamation of the High Commissioner, which rested upon the authority of an Order in Council, which in turn rested upon the authority of the Foreign Jurisdiction Act of 1890 (53 & 54 Vict. c. 37). The respondent was the Secretary of State for the Colonies. The King's Bench Division (Lord Alverstone, C. J., Ridley and Darling, JJ.) dismissed the petition upon the grounds that the writ could not issue to the Protectorate and could not issue to the Secretary of State. Upon appeal, the Court of Appeal, Supreme Court of Judicature (Vaughan Williams, Farwell and Kennedy, L. JJ.), affirmed, but principally upon the ground that a provision in the Proclamation that no writ calling in question the legality of the arrest or detention of this petitioner should have any effect, was valid. In the course of the opinion, the judges made clear their opinions that the writ could issue at the petition of persons beyond the seas and that the writ could be addressed to an official having authority over the jailer, although they thought that the High Commissioner and not the Secretary would be the proper respondent, since the Secretary had only advisory power. The lengthy discussions of the meaning and effect of the Foreign Jurisdiction Act and of the validity of the Order in Council and of the Proclamation, under British law, are not pertinent here. Parliament and the Crown together could, and did upon occasion, suspend the privilege of the writ, a power which Congress does not have.

The British Habeas Corpus Act of 1862 (25 & 26 Vict. c. 20) provided:

> "Sect. 1. No writ of *habeas corpus* shall issue out of England by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice having authority to grant and issue the said writ, and to ensure the due execution thereof throughout such colony or dominion."

This enactment seems to establish that prior to that time the writ did issue to dominions where there were courts of competent jurisdiction and also that after that date the writ might issue to any place, within British jurisdiction, where there are no courts competent to issue and execute the writ.

There is an English case, in 1939, in which Mr. Justice Cassels, in Vacation Court, held that although the writ would issue on behalf of aliens, it would not apply to an alien in a foreign country. The learned justice relied upon an expression of view by Lord Kennedy in Rex v. Crewe, *supra*. *In re* Ning Yi-Ching and others, 56 Times Law Rep. 3. *See* 6 SOLICITOR 196 (1939).

[15] *Ex parte* Quirin, 317 U. S. 1, 25, 87 L. Ed. 3, 63 S. Ct. 1 (1942); *In re* Yamashita, 327 U. S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946).

habeas corpus, and that habeas corpus is the proper proceeding by which to test the jurisdictional authority of military tribunals.[16]

If it be held that no court has jurisdiction to issue a writ of habeas corpus upon petition of a person confined outside the territorial United States, the ruling would deny the protection of the Constitution to citizens of the United States confined abroad by action of and in custody of officials of the United States. The only escape from that conclusion would be to distinguish between citizens and aliens.[17]

We think that constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory. That is the nub of this whole matter. If the action of Government officials be beyond their constitutional power, it is for that reason a nullity. No more need be proven to establish its invalidity. Absent constitutional power, neither the objective nor the subject matter of an act is material. Whether given circumstances place a given action outside an apparent constitutional prohibition and so within constitutional power, is a different question, to be established by proof and not to be considered unless raised and supported. That is a matter of decision and not of judicial jurisdiction. For these reasons, we think that a distinction between citizens and aliens cannot be made in respect to the applicability of constitutional restrictions upon the power of government.

There is a vast difference between the delegated power of our Federal Government and the unrestricted power of the British Crown and Parliament.[18] Whatever may be the concept of restrictions upon governmental power in that country, and so of the applicability of the writ there, in this country constitutional restrictions are absolute and the writ must apply wherever such a restriction is transgressed and no other remedy is available.

Upon the foregoing considerations, we see no escape from the conclusion we have stated, that any person deprived of his liberty by an official of the United States Government in violation of constitutional prohibitions, has a substantive right to a writ of habeas corpus.

2. We think that if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal

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[16] Cases cited *supra* note 15, and *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866), and Duncan v. Kahanamoku, 327 U. S. 304, 90 L. Ed. 688, 66 S. Ct. 606 (1946).

[17] Wolfson, *Americans Abroad and Habeas Corpus; The Trap Begins to Close*, 10 FED. BAR J. 69 (1948).

[18] 1 BL. COMM. *9; STORY, CONSTITUTION OF THE UNITED STATES § 1614 (5th ed. 1891).

jurisdictional statute. This conclusion follows from these premises. *First*. The right to habeas corpus is an inherent common law right.[19] *Second*. The Federal Government cannot suspend the privilege, except when, in cases of rebellion or invasion, the public safety may so require.[20] This prohibition is in the First Article of the Constitution itself, its importance gauged by the fact that the Constitutional Convention did not leave the possibility of misunderstanding upon the topic to later determination, as they did the several prohibitions later incorporated in the first Ten Amendments. *Third*, Congress could not effectuate by omission that which it could not accomplish by affirmative action. So, if the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result.

It may be reasoned that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction",[21] and that, therefore, a federal court has no jurisdiction outside that which is conferred by a congressional enactment, a written law.[22] It might be, theoretically at least, that in ordaining and establishing and conferring jurisdiction upon the inferior courts, Congress might omit mention of some case or cases arising under the Constitution or laws of the United States. In such event, the argument from the above-stated premise might be that the contestants in that controversy were deprived of a forum for the adjudication of their dispute. We doubt that the affirmative conclusion to that proposition would be valid if the case concerned the authority of officials of the United States to act. It is established that a state court cannot inquire, upon petition for habeas corpus, into the validity of the confinement of a person held under the authority of the United States.[23] Therefore, unless the federal jurisdiction statute be construed as coextensive with governmental action by United States officials, such action outside the specifications of the statute would be wholly immune from judicial power; in other words, outside the necessity for compliance with the Constitution. To state the proposition would seem to refute it.

Moreover, the constitutional grant of judicial power to the Federal Government extends "to all Cases, in Law and Equity, arising under"

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[19] 3 BL. COMM. *131, *133.

[20] U. S. CONST. ART. I, § 9, cl. 2.

[21] Marshall, Ch. J., in *Ex parte* Bollman and *Ex parte* Swartout, 4 Cranch 75, 93, 2 L. Ed. 554, 561 (1807).

[22] See Dobie, *Habeas Corpus in the Federal Courts*, 13 VA. L. REV. 433, 441 (1927).

[23] Ableman v. Booth, 21 How. 506, 523, 16 L. Ed. 169, 176 (1859); Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 S. Ct. 544 (1884).

the Constitution and laws of the United States and under the treaties made under its authority.[24] And the Constitution further provides that the judicial power of the United States "shall be vested" in the Supreme Court and in such inferior courts as Congress may establish.[25] It was held early in our history that these provisions were compulsory upon Congress to confer the whole of the federal judicial power upon some federal court.[26] The Supreme Court has denied that it has jurisdiction to issue a writ upon petition of a person confined outside the United States.[27] It follows that if the case presented by these appellants arises under the Constitution, laws or treaties of the United States, as it clearly does, jurisdiction to entertain it is in some district court by compulsion of the Constitution itself.[28]

In this connection, it is interesting to note that the constitutional prohibitions upon federal action contain no such proviso as Section 5 of the Fourteenth Amendment.

Upon the precise problem before us, we conclude that whatever may be the lack of forum in other cases, the Constitution specifically prohibits that result in respect to habeas corpus. Congress cannot suspend that privilege, unless there be invasion or rebellion.

3. We think, upon the basis of the foregoing conclusions, that when a person is deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States, that person's petition for a writ of habeas corpus will lie in the District Court which has territorial jurisdiction over the officials who have directive power over the immediate jailer.

The question here is not whether a court, either state or federal, can exercise its judicial power within the jurisdiction of another and

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[24] U. S. Const. Art. III, § 2, cl 1.

[25] U. S. Const. Art. III § 1.

[26] Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816); Story, Constitution of the United States §§ 1590-1597, 1702 (5th ed. 1891).

[27] *Ex parte* Betz, 329 U. S. 672, 91 L. Ed. 593, 67 S. Ct. 39 (1946).

[28] If it were to be held that Congress failed to confer upon the inferior federal courts the full judicial power vested in those courts by the Constitution, and that the residuum no so conferred remains in the common law courts until its exercise by federal courts is authorized by the Congress (reasoning similar to that employed with reference to constitutional grants of legislative power), the United States District Court for the District of Columbia could issue the writ in cases falling within that classification. That court is not only a federal court but also has the full common law powers originally held by the courts of Maryland. Organic Act of 1801, §§ 3, 5, 2 Stat. 103, D. C. Code p. XXXIII (1940).

independent government.[29] The question is whether it can exercise that power upon those Government officials within its territorial jurisdiction who have directive power over the immediate jailer outside the United States but acting solely upon authority of this Government.[30] We think that it can, if that be the only means of applying the Constitution to a given governmental action.

We perceive nothing singular in the application of judicial authority to those who have directive power, if such application is the only means of enforcing the prohibitive clauses of the Constitution.[31] "Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said—as in *Mooney* v. *Holohan*, 294 U. S. 103, 113—that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice."[32]

The statute lends itself to a construction that it is coextensive with executive power, at least in so far as prisoners in jail are concerned. While it states the matter in the negative, it says: "The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, . . . or is in custody in violation of the Constitution or of a law or treaty of the United States; . . ."[33] The statute also says that the writ shall be directed to the person "in whose custody" the party is detained.[34] It is not too violent an interpretation of "custody" to construe it as including those who have directive custody, as well as those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements. Such an interpretation need not affect the doctrine that if the immediate custodian be within the jurisdiction of a federal

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[29] United States v. Tarble, 13 Wall. 397, 20 L. Ed. 597 (1872). There are numerous other cases involving that problem.

[30] Discussion of this topic usually goes back to the concurring opinion of Judge Cooley in *In re* Jackson, 15 Mich. 417, 433 (1867).

[31] McGowan v. Moody, 22 App. D. C. 148 (1903), rested upon the view that the Secretary of the Navy was not the proper party respondent, because he had advisory power only, much the same as the view of the judges as to the Secretary of State in Rex v. Crewe, *supra* note 14. *See* Sanders v. Allen, 69 App. D. C. 307, 100 F. 2d 717 (1938).

[32] Johnson v. Zerbst, 304 U. S. 458, 467, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938).

[33] Rev. Stat. § 753, 28 U. S. C. A. § 453 before revision; now 28 U. S. C. A. § 2241.

[34] Rev. Stat. § 755, 28 U. S. C. A. § 455 before revision; now 28 U. S. C. A. § 2243.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Constitutional provision and statute involved	2
Statement	3
Reasons for granting the writ	5
Conclusion	15

CITATIONS

Cases:

Ahrens v. *Clark*, 335 U. S. 188	4, 6, 7
Anderson, Ex parte, 3 El. and El. 487 (1861, Q.B.)	12
Betz, Ex parte, 329 U. S. 672	11
Bird v. *Johnson*, 336 U. S. 950	11
Bush, In the Matter of, 336 U. S. 971	11
Chicago & Southern Air Lines, Inc. v. *Waterman Steamship Corp.*, 333 U. S. 103	8
Darsey v. *Gill*, 148 F. 2d 857	5
Hines v. *Davidowitz*, 312 U. S. 52	12
Hirota v. *MacArthur*, No. 239, Misc., 1948 Term, decided June 27, 1949	7
Jones v. *Biddle*, 131 F. 2d 853, certiorari denied, 318 U. S. 784	14
Ludecke v. *Watkins*, 335 U. S. 160	11
McGowan v. *Moody*, 22 App. D. C. 128	6, 14
Ning Yi-Ching, In re, and others, 56 The Times Law Reports 3	9
Oetjen v. *Central Leather Co.*, 246 U. S. 297	8
Quirin, Ex parte, 317 U. S. 1	11, 12
Sanders v. *Bennett*, 148 F. 2d 19	14
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	8
Wales v. *Whitney*, 144 U. S. 564	13
Yamashita, In re, 327 U. S. 1	11, 12

Constitution and Statutes:

Constitution, Article I, Sec. 9, Cl. 2	2
28 U.S.C. 2241	2, 5
28 U.S.C. 2242	7
28 U.S.C. 2243	13
Habeas Corpus Act of 1679, Act of 13 Car. II, Sec. XII	10

Misc.

	Page
Church, *The Writ of Habeas Corpus* (2d ed. 1893)	9, 10
Holdsworth, 9 *History of English Law*	10
Nobleman, *The Administration of Justice in the United States Zone of Germany* (1946), 8 Fed. B.J. 70	14
Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany* (1947), 33 Am. Bar Assoc. J. 777	14
Nobleman, *Procedure and Evidence in American Military Government Courts in the United States Zone of Germany* (1947), 8 Fed. B.J. 212	14

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. —

LOUIS A. JOHNSON, SECRETARY OF DEFENSE OF THE UNITED STATES, ET AL., PETITIONERS

v.

LOTHAR EISENTRAGER, ALIAS LUDWIG EHRHARDT, ON HIS OWN BEHALF AND AS NEXT FRIEND OF FRANZ SIEBERT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 83) reversing the order of the District Court for the District of Columbia (R. 21) which dismissed the petition for writs of habeas corpus for lack of jurisdiction, and remanding for further proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 73-82) has not yet been reported. The opinion of the District Court (R. 21-22) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1949 (R. 83) and a petition for rehearing was denied June 6, 1949 (R. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military commission imposed after trial and conviction for violations of the laws of war.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, § 9, cl. 2 of the Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. 2241 provides:

> *Power to grant writ*
>
> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within

their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

STATEMENT

On April 26, 1948, a petition for a writ of habeas corpus was filed in the United States District Court for the District of Columbia by respondents, 21 German nationals now confined in Landsberg Prison, Germany, in the American occupation zone, in the custody of the United States Army (R. 2-9, 10-11, 17). The writ was sought to be directed to the Secretary of Defense, the Secretary of the Army, the Chief of Staff of the United States Army, and the members of the Joint Chiefs of Staff, as officials resident in the District of Columbia who "have jurisdiction and supervision over the official acts of the Commandant of Landsberg Prison" (R. 17).

The prisoners alleged that they had been employed by various civilian agencies of the German Government in China on and before May 8, 1945, when Germany surrendered to the Allies. They continued to reside in China thereafter under the control and domination of the military forces of the Japanese Empire. After the cessation of hostilities with Japan on August 15, 1945, these German nationals were charged by United States authorities with violations of the laws of war in having engaged in military activities against the United States after Germany surrendered. They were

tried and convicted as war criminals by a United States Military Commission appointed by the Commanding General of the Nanking Headquarters Command, and received sentences ranging from two years to life imprisonment. They are presently confined pursuant to those sentences in Landsberg Prison in the custody of the United States Army. In their petition the prisoners alleged that their trial and detention violates provisions of the Constitution and laws of the United States and of the Geneva Convention of July 27, 1929, relating to the treatment of prisoners of war. (R. 2-9, 10-11).[1]

The district court denied the petition for lack of jurisdiction, on the authority of *Ahrens v. Clark*, 335 U. S. 188 (R. 21-22). Upon appeal, the United States Court of Appeals for the District of Columbia Circuit held that the district court has jurisdiction to entertain a petition for a writ of habeas corpus directed to those officials resident in the District who have ultimate authority over the immediate jailer in Germany. The judgment of the district court, therefore, was reversed and the case

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[1] Petitioners averred that (a) the offense with which they were charged did not constitute an offense against the laws of war; (b) the military commission had no jurisdiction in the absence of hostilities, martial law, or American military occupation of China; (c) the rules of procedure for the trial, and the trial itself, violated rights guaranteed to prisoners by Article 63 of the Geneva Convention; (d) the commission was without jurisdiction because the United States had failed to give notice to the protecting power under the Geneva Convention; and (e) petitioners were at all times civilians and therefore outside the jurisdiction of the military commission (R. 8-9, 11).

was remanded to determine whether such authority exists in the officials named as defendants, and, if so, to pass upon the merits of the petition (R. 82-83).

REASONS FOR GRANTING THE WRIT

In affording enemy aliens access to our courts to test their detentions by American officials any place in the world, the decision below is obviously of far-reaching importance. The Judge Advocate General of the Army has advised that this holding will breed delay and uncertainty in the finality of the judgments in all United States military government and war crimes trials and will impede the orderly administration of enemy occupied areas. There is no precedent in this Court for the application of the writ of habeas corpus to aliens confined outside the territory of the United States and we believe that if the jurisdiction of the District Court for the District of Columbia is to be so extensive [2] no less an authority than this Court should say so.

1. Since the writ of habeas corpus may be issued by district courts only "within their respective jurisdictions" (28 U.S.C. 2241(a)), and since those words "limit the district court to inquiries into the

[2] The number of petitions for habeas corpus filed in the district court from sources within the District itself constitutes a tremendous burden. *Dorsey* v. *Gill*, 148 F. 2d 857, 864-865 (C.A. D.C.). If, contrary to the decision below, it is not constitutionally imperative that petitions from prisoners detained abroad be entertained, and if Congress should see fit to extend the privilege of habeas corpus to such prisoners, the burden of passing upon such petitions may be distributed among the various district courts.

causes of restraints of liberty of those confined or restrained within the territorial jurisdiction of those courts" (*Ahrens* v. *Clark*, 335 U. S. 188, 190), it would seem that the court below improperly relied upon the absence of any other forum for alien enemies confined abroad as the basis for imputing to the District Court for the District of Columbia power to entertain their petitions. In *McGowan* v. *Moody*, 22 App. D. C. 148, 158, which is cited with apparent approval in the *Ahrens* opinion, the court said, "The question is one of power, and not of the expediency of its exercise in the particular case, because there may happen to be no other tribunal in which relief might be had." And, as Mr. Justice Rutledge observed in his dissent in the *Ahrens* case (p. 209):

> * * * if absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, * * * then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had * * *.

In the *Ahrens* decision this Court, it is true, reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights" (p. 192, fn. 4). And the author of the *Ahrens* opinion has since aligned himself with

the view of the court below that in such circumstances judicial power to issue the writ resides in that court which has within reach of its process a respondent who possesses directive power over the jailer outside of the country (Douglas, J., concurring in *Hirota* v. *MacArthur*, No. 239, misc. 1948 Term, decided June 27, 1949). But the reasoning by which this Court reached its conclusion in *Ahrens* that, where there is no detention within the district, there is by Congressional mandate a total absence of power to issue the writ, rather than a mere withholding of power in the interest of orderly administration, points directly to a similar complete failure of jurisdiction in cases of confinement abroad, at least where the prisoner is an alien enemy.[3]

2. a. In addition to its departure from the rationale of the *Ahrens* opinion, the decision below rests on very doubtful premises. Granted, as the court below said, that American officials are subject to the Constitution wherever they act, and that action in violation of the Constitution is void, it does not necessarily follow that a judicial rem-

[3] The conclusion that the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction of the court is reinforced by the recent revision of the statute in the new Title 28 of the United States Code, which added a new provision, Sec. 2242, to the former habeas corpus statute, to the effect that, if an application is made to this Court or to a circuit judge, "it shall state the reasons for not making application to the district court *of the district in which the applicant is held.*" [Italics supplied.] That section assumes that there must be detention within the territorial jurisdiction of a district court.

edy, perforce habeas corpus, is available to contest that action. One may well doubt the breadth of the basic premise (R. 76) that "In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power." Abundant exceptions come to mind, particularly in the realm of foreign affairs and the conduct of war, in which the Executive is the primary and often the sole guardian of the Constitution. As this Court observed in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111.

b. The court below stated that, unless Congress provides a forum for any petitioner entitled to the writ of habeas corpus, it would amount to a violation of the constitutional prohibition against suspension of the writ. Accordingly, the court felt constrained to construe the habeas corpus jurisdictional statute—despite its reference to the "respective jurisdictions" of the various courts and the gloss put upon that terminology in the *Ahrens* and previous decisions—to permit a petition to be filed in the district court with territorial jurisdiction

over the officials who have directive authority over the immediate jailer in Germany. But we think the premise that enemy aliens confined abroad are constitutionally entitled to the writ is of most doubtful validity. With full deference to the view that the writ of habeas corpus is a basic safeguard of liberty, we doubt that the framers of our Constitution contemplated it as a method for setting aside all void actions by government officials any place in the world, whether such actions affected citizens, friendly aliens or enemy aliens. The amplitude of the writ of habeas corpus as prescribed by the Constitution is probably no greater than it was at common law or under the English statutes at the time the Constitution was adopted. And we have been unable to find any authority for the proposition that the writ was then available in behalf of aliens confined in a foreign country. Cf. Church, *The Writ of Habeas Corpus* (2d ed. 1893), §§ 107, 108.[4]

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[4] In 1939, Great Britain exercised certain rights of administration and control in Tientsin, China, by virtue of a lease which it had acquired by treaty with China. Four Chinese were detained by British authorities and a writ of habeas corpus was sought in England, directed to the Foreign Secretary and to certain officials at Tientsin to have the four Chinese brought to England for the purpose of an inquiry into the legality of their detention. Judge Cassels, in Vacation Court, held that a writ of habeas corpus would not issue in respect of a foreigner detained in a foreign territory. *In re Ning Yi-Ching and others*, 56 The Times Law Reports 3. Although eminent counsel appeared in the case, the reporter noted that Judge Cassels "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm."

In his *History of English Law* (vol. 9, p. 116), Holdsworth reports that, prior to the Habeas Corpus Act of 1679, it was a common abuse for jailers to "move the prisoner about to evade service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." Legislation was enacted "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts" with resulting defeat of habeas corpus jurisdiction. *Id.* at p. 117. But the remedy adopted to prevent such illegal imprisonment beyond the seas was not the expansion of the court's jurisdiction but rather the enactment of more stringent sanctions, including the enhancement of damages in actions for such false imprisonment, provision for forfeiture of office upon conviction, ineligibility for pardon, etc. Habeas Corpus Act of 1679, Act of 31 Car. II, Section XII; Church. *The Writ of Habeas Corpus*, pp. 54-55.[5] It seems to have been assumed that detention within the jurisdiction of the court was necessary to authorize the issuance of the writ. Thus Holdsworth concluded (vol. 9, p. 124) that "it was a well-established principle that, though the writ could not issue into the foreign dominions of a prince who succeeded to the throne of England, and therefore not into Scotland or Hanover, it could issue into any other part of the king's dominions."

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[5] The Habeas Corpus Act of 1679 limited its sanctions against removal of prisoners to foreign lands to "any person or persons, subjects of this realm." Secs. IX, XI, XII.

c. In any case, there is no basis for holding that enemy aliens located in enemy territory have any substantive rights under our Constitution or laws which may be prosecuted through the writ of habeas corpus. The rights of these enemy aliens all flow from and must be vindicated within the framework of the system established for the occupation of their country, and they cannot properly call upon the protections and rights stemming from our domestic or internal law. Congress may have indicated by its legislation an intention to grant certain rights under American law to enemy aliens found on American territory (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1; *Ludecke* v. *Watkins*, 335 U. S. 160), but this exceptional legislative solicitude should not serve as a point of departure to accord, without comparable legislative sanction, similar substantive rights under American law to enemy aliens living abroad to whom Congress has not been so generous. And it is, of course, highly unlikely that Congress would make available the procedural remedy of habeas corpus to alien enemies without any substantive rights to be vindicated by the writ.

d. We need not reach the question whether the writ is available to citizens of the United States detained in a foreign country by American officials. Cf. *Ex parte Betz*, and companion cases, 329 U. S. 672; *In the Matter of Bush*, 336 U. S. 971; *Bird* v. *Johnson*, 336 U. S. 950. One ground of distinction

is that the right of citizens to have the writ issue in their behalf—so long, at least, as they are detained in a place which is actually subject to the control or dominion of our Government—may have obtained at common law (cf. *Ex parte Anderson*, 3 El. and El. 487, 494 (1861, Q.B.), and thus have been a part of the concept of habeas corpus which was carried over into the Constitution and the statute. Another difference, as we have suggested, is that American citizens have substantive rights under American law which can be pressed by means of the writ, while enemy aliens living abroad have none. And in any case, it would not be antithetic to the Constitution or our history to hold that while our fundamental law may implicitly grant a universal right of freedom from detention by Americans to American citizens, it gives only a territorially limited right to aliens, whose rights frequently do not equal those of citizens. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 69-74. Enemy aliens detained *within* the territory of the United States are also unaffected by the position we take here, for resort by such prisoners to district courts has been held within the purview of the habeas corpus statute. *Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1.

For present purposes, it is enough to say that Congress is not required by the Constitution to give habeas corpus rights to alien enemies outside the country and has not expressed any intention of doing so. Whether Congress should extend the

same rights to alien enemies outside our territory as are available to those within may depend upon such factors as the distance of foreign places of confinement to courts in this country, the availability of witnesses and their amenability to process of our courts, expenses of transportation, etc., as well as the need for expedition in the execution of our international undertakings in punishing war criminals and in occupying enemy areas. We submit that these are matters for legislative consideration—unfettered by the view of the Constitutional requirement on which the decision below is based.

e. Intertwined, of course, with the question of the jurisdiction of the district court in the case of applicants not detained within the court's territorial confines is the problem of whether governmental officials who have ultimate directive authority over the immediate jailer, as distinguished from actual physical custody, are proper respondents. The statute (28 U.S.C. 2243) provides that the writ "shall be directed to the person having custody of the person detained". In respect of a substantially similar provision in a predecessor statute this Court stated that Congress contemplated "a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court or judge, that he might be liberated if no sufficient reason is shown to the contrary." *Wales*

v. *Whitney*, 114 U. S. 564, 574. Certainly, the Secretary of Defense, the Secretary of the Army, and the other officials who were named respondents in no sense have "immediate" or "actual physical" custody of the prisoners, and, under such decisions as *McGowan* v. *Moody*, 22 App. D. C. 128, 163, *Jones* v. *Biddle*, 131 F. 2d 853 (C.A. 8), certiorari denied, 318 U. S. 784, and *Sanders* v. *Bennett*, 148 F. 2d 19 (C.A. D. C.), they were improperly named respondents. Although we have no reason to doubt that these officials have power to effectuate a mandate which the district court might issue for the release of the prisoners, that practical consideration (which is always present when the jailer is a government official responsible to a superior official resident in the District of Columbia) does not dispel our doubts that Congress intended the writ to be issued to them.

3. The extraordinary reach of the Court of Appeals' holding is suggested by the fact that several hundred thousand cases have been tried in Germany, Japan, and Italy by military government courts and other American-manned tribunals since United States troops first occupied those enemy countries in World War II. See Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany* (1947), 33 Am. Bar Assoc. J. 777; Nobleman, *The Administration of Justice in the United States Zone of Germany* (1946), 8 Fed. B. J. 70; Nobleman, *Procedure and*

Evidence in American Military Government Courts in the United States Zone of Germany (1947), 8 Fed. B. J. 212. In Germany and Japan many trials of this type continue to be held, as part of the control program demanded by the occupation of these great powers. On any assumption as to the disposition of this mass of cases, the decision below obviously has the broadest incidence.

CONCLUSION

It is respectfully submitted that a question of great importance which has not been, but should be, decided by this Court is involved, and, therefore, this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

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